

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Review of the Section 251 Unbundling
Obligations for Incumbent Local Exchange
Carriers

CC Docket No. 01-338

Implementation of the Local Competition
Provisions of the Telecommunications Act
of 1996

CC Docket No. 96-98

Deployment of Wireline Services Offering
Advanced Telecommunications Capability

CC Docket No. 98-147

**CONSOLIDATED REPLY OF SUREWEST TO OPPOSITIONS TO
PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION**

SureWest Communications (“SureWest”), by its attorneys, hereby files this Consolidated Reply to the Oppositions to the Petition for Clarification and Partial Reconsideration filed by SureWest in the above-captioned proceeding on October 2, 2003 (“SureWest Petition”). While the competitive local exchange carriers (“CLECs”) have opposed the proposals in the SureWest Petition, they appear to misread the breadth of the Commission’s commitment to creating incentives to promote the construction of new broadband facilities for the provision of advanced services to the public. If that commitment is to be fulfilled speedily and efficiently, then certain issues in the Commission’s Triennial Review Order¹ must be clarified.

¹ Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand, 18 FCC Rcd 16978 (2003) (“TRO”).

I. The Oppositions Fail to Acknowledge the Commission's Intent to Provide Broad Relief from Unbundling Obligations for Fiber.

In its Petition, SureWest noted that it has deployed fiber-to-the-home ("FTTH"). While SureWest sees the future as one of increasing importance for broadband services, it has great concern that the Commission's policies do not fully and properly promote investing in broadband facilities. Although SureWest has deployed some FTTH, it has no doubt that the speed and efficiency of its future deployment most likely would be more rapid and less expensive if the ambiguities in the *TRO* were clarified as suggested in the Petition, *i.e.*:

1. Elimination of the ambiguities that pose barriers to deployment of fiber to multi-unit premises;
2. Clarification that mass market fiber-to-the-premises ("FTTP") includes customer locations with up to 48 numbers; and
3. Clarification that network upgrades and installation of broadband capability would not constitute a disruption or degradation of time division multiplex ("TDM") capability.

These clarifications would serve the public interest and promote the statutory directive in Section 706 of the Telecommunications Act of 1996 to facilitate the availability of advanced telecommunications capabilities to all Americans.

It is clear that the Commissioners intended in this proceeding to provide very broad relief from unbundling obligations for fiber broadband facilities. Chairman Powell noted that "I have long stated that broadband deployment is the most central communications policy objective of our day . . . [the *TRO*] decision makes significant strides to promote investment in advance architecture and fiber by removing impeding unbundling obligations."² Commissioner Martin

² Separate Statement of Michael K. Powell at 1 (February 20, 2003).

stated that the “action we take today provides sweeping regulatory relief for broadband and new investments. It removes unbundling requirements on all newly deployed fiber to the home.”³ Commissioner Abernathy stated that “I strongly support the Commission’s decision to exempt new broadband investment from unbundling obligations.”⁴ Much of the *TRO* contains language consistent with the goal of the Commissioners to broadly promote deployment of broadband fiber facilities. For example, the *TRO* states at paragraph 288 that deploying unbundling obligations “to these next-generation network elements would blunt the deployment of advance telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in Section 706.” Paragraph 272 of the *TRO* states that the Commission’s goal is to provide incumbent local exchange carriers (ILECs) with “certainty that fiber optic and packet-based networks will remain free of unbundling requirements,” so that they “will have the opportunity to expand the deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market.”

Nevertheless, the *TRO* contains some unclear language and ambiguities in some details that may well be inadvertent, but without clarification such language could significantly undercut the statutory goals and those expressed by the Commissioners and stated elsewhere in the *TRO*, such as the goal of regulatory certainty set forth in paragraph 272 of the *TRO*. These unclarities and ambiguities were detailed in the SureWest Petition, as well as in the Petitions for Reconsideration filed in this proceeding by BellSouth Corporation (“BellSouth Petition”), and

³ Press Statement of Commissioner Kevin J. Martin on the Triennial Review at 1 (February 20, 2003).

⁴ Press Statement of Commissioner Kathleen Q. Abernathy at 1 (February 20, 2003).

by the U.S. Internet Industry Association. While SureWest will address some of the arguments made in the oppositions to these petitions, as a general matter they suffer from the same flaw: they seem to miss the forest for the trees. That is, the Oppositions miss or purposely ignore the broad intent expressed by the Commissioners to provide certainty to carriers that deploy fiber optic networks, that these networks will remain free of unbundling requirements, and thus have an incentive to rapidly deploy these networks and provide new broadband services to the public.

II. The Record Demonstrates the Need to Eliminate Barriers to Deployment of Fiber to Multi-Unit Premises.

As demonstrated in the SureWest Petition, two aspects of the rules enacted in the *TRO* when applied in combination to the multi-unit premises, will create substantial uncertainty and act as a deterrent of the deployment of FTTP. First, the rules are ambiguous as to whether the fiber loop facilities deployed from a central office to a multi-unit premise are entitled to unbundling relief that applies to FTTP. While such relief would be consistent with the goals expressed by the Commissioners, footnote 624 in the *TRO* suggests that multi-unit premises customers are to be treated like enterprise customers, even when they are not. In addition, because of the Commission's definition of what constitutes FTTP, the *TRO* might be construed to limit FTTP to multi-unit premises where the wiring inside the building is not owned by the ILECs.

As discussed in the SureWest Petition, these ambiguities have a substantial impact on the incentives for ILECs to deploy new fiber facilities. ILECs cannot efficiently design and build a fiber network that extends to only certain buildings in particular areas, or if uncertainty or ambiguity exists about which buildings, and which customers within those buildings, qualify for

unbundling relief and which do not. Such ambiguities can only add costs and delays to the deployment of fiber facilities. Ultimately, it is the end users who suffer when deployment is delayed and more costly. Accordingly, SureWest requested clarification that the relief from unbundling that applies to FTTP includes loops from a central office to a multi-unit premise.

SureWest's suggestion was addressed in the Opposition filed by WorldCom, Inc. d/b/a MCI ("MCI Opposition"). MCI argues (Opposition at pages 9-10) that the proposal in the SureWest Petition would not increase the incentive to deploy fiber since ILECs are deploying fiber in any case, and will continue to do so "in situations in which it makes economic sense to do so." However, from a practical standpoint, "economic sense" is often dictated by regulatory policy. If a regulatory policy decreases a carrier's likelihood of earning profits on deployment of certain facilities, then that deployment will either not occur or will be delayed. Thus, the *TRO* clearly recognizes that relief from unbundling obligations creates incentives for the deployment of fiber, and that regardless of the existing deployment of fiber, new incentives need to be created if the goals of Section 706 are to be fulfilled. MCI's argument would turn that approach on its head. Eventually, at some point down the line, all network deployment by LECs will be fiber facilities. But the purpose of relief from unbundling is to create incentives to significantly speed up the deployment of fiber. To the extent unclarities identified in the SureWest and BellSouth Petitions remain, they may increase the costs and complexity of deployment. This will substantially decrease the speed and efficiency, while increasing the cost, of deployment of fiber to end users.

The Opposition of Covad Communications states that all the petitions, including the SureWest Petition, must fail at very least on "one simple ground: none of them provides any evidentiary support that further deregulation is warranted." Covad Opposition at page 4. The

Opposition goes on to suggest that the petitions are similarly flawed for lack of specifically quantifying the additional fiber deployment that consumers could expect if the proposals in the petitions were enacted. *Id.* In response, SureWest notes that it is not going to reveal the specific deployment schedule of its business plans to its competitors, nor is it capable of revealing the deployment plans of other carriers. Rather, it will rely for support on the findings specifically made in the *TRO*. For example, paragraph 278 of the *TRO* states that “we determine that, particularly in light of a competitive landscape in which competitive LECs are leading the deployment of FTTH, removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market.” Similarly, in footnote 837 of the *TRO*, the Commission cited and relied on showings by independent parties estimating the increase in fiber deployment that would result from relief of unbundling requirements. Thus, SureWest relies on the finding made in the *TRO*, and requests only clarification of matters that appear inconsistent with such findings. Additional support is also available in the record in this proceeding. For example, in supporting SureWest’s Petition, Verizon notes that the ambiguities discussed herein

[would] risk creating a patchwork of broadband unbundling requirements, with obligations varying from state-to-state, neighborhood-to-neighborhood, building-to-building, and even customer-to-customer. Such requirements can impact the design, efficiency, and, ultimately, the viability of deploying broadband networks. And, even where these requirements do not apply directly, they impede the ability to design a uniform and efficient network, which makes the already risky economics of making significant investment in this new technology more difficult. As a result, such requirements undermine the incentives to deploy broadband facilities and increase costs to consumers where they are deployed.

Verizon Response to Petitions for Reconsideration, at pages 1-2. Verizon goes on to state that imposing the broadband unbundling obligations which may result from the discussed

ambiguities and unclarities, would “have a negative effect on the economics of deploying broadband facilities ...” and that “[g]iven the enormous costs involved in deploying fiber-to-the-premises, it is essential to be able to serve as large a customer base as possible. This improves the economies of scope and scale that can be achieved in everything from equipment purchases to the efficient utilization of customer service centers.” Verizon Response at page 16.⁵

The SureWest Petition also requested that the Commission clarify that mass market FTTP loops subject to relief from unbundling include customer locations with up to 48 telephone numbers. The basis for this request was the following. The *TRO* made a nationwide determination that fiber supplied to mass-market customers should not be unbundled. However, in failing to establish a proper definition of mass-market customers for this purpose, it created significant and potentially damaging uncertainty. The *TRO* limited the definition of “fiber-to-the-home loops” to those serving residential end user customer premises. In its subsequent *Errata*, the Commission removed the word “residential” from the definition, and in doing so demonstrated that definition was intended to include some businesses as well.⁶ Although the clarification in the *Errata* resolved part of the problem, significant uncertainty remains regarding which “premises” are included in the definition. The SureWest Petition suggested that one way

⁵ See also, Footnote 677 of the *TRO*, citing Comments of the High Tech Broadband Coalition at 28-33, and Appendix A (John Haring and Jeffrey H. Rohlfs, *The Disincentives for ILECs Broadband Deployment Afforded by the FCC’s Unbundling Policies* (July 16, 2002)). SureWest notes specifically Section 10 of the Haring/Rohlfs paper, “Quantifying the Negative Effects of Unbundling Requirements.”

⁶ See also, Opposition of the Federal Communications Commission to Allegiance Telecom Inc.’s Motion for Stay Pending Review, at 13 (filed October 21, 2003, *Allegiance Telecom, Inc. v. FCC*, Nos. 03-1316 *et al.*, D.C. Cir.) (“nothing in the Commission’s discussion of FTTH loops indicates that the FTTH non-impairment finding was limited to residential end users,” so the *Errata* “merely conformed the rule to the discussion in the text of *Order*”).

to clarify the definition of mass-market loop for this purpose would be to define mass market in a specific bright line fashion, to include customers with up to 48 telephone numbers, the equivalent of two DS1 loops. SureWest Petition at page 7. Yet, while CLECs agree that the rule as currently written is impermissibly vague,⁷ many oppose the SureWest proposal. Nevertheless, their arguments are unpersuasive.

For example, MCI asserts that such clarification would “be inconsistent with the FCC’s decision to exclude customers with more than three phone lines from its definition of the mass market for purposes of its unbundled switching analysis.” MCI Opposition at pages 7-8. However, as set forth in paragraph 497 of the *TRO*, the Commission did not mandate any specific cutoff for mass-market customers for the purposes of the unbundled switching rules. Rather, it left this determination up to the states. There is no need to apply the approach from switching to the context of broadband loops. The distinction in the switching context applies to hot-cuts, a distinction which is irrelevant for the purposes of FTTP rules. Similarly, MCI is concerned that because 48 telephone numbers is the equivalent of two DS1’s, such requirements are typically used to serve enterprise customers, and the *TRO* has found impairment without access to DS1s. MCI Opposition at page 8. *See also* Covad Opposition at pages 9-10. Yet, as previously noted, the Commission has stated that nothing in the *TRO* indicated that the FTTH non-impairment finding was limited to residential end users.⁸ Furthermore, CLEC concerns about access to DS1s are remedied by the fact that under the policies of the *TRO*, if the fiber is an overbuild of existing copper facilities, the CLEC retains access to the existing copper

⁷ See Opposition of Allegiance Telecom, et. al. at page 12.

⁸ See Note 6, *supra*.

facilities. Similarly, if the fiber is to a new building, the Commission has already found that CLECs are in an equal or better position than ILECs in their ability to deploy fiber in such situations. *TRO* at paras. 240, 273, and 276.

III. Conclusion

The Commission has expressed a commitment to creating broad incentives to promote the construction of new broadband facilities for the provision of advanced services to the public. If that commitment is to be fulfilled speedily and efficiently, then certain issues in the Commission's *TRO* should be clarified as set forth in the SureWest Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., do hereby certify that a true copy of the foregoing *Consolidated Reply of SureWest to Oppositions to Petition for Clarification and Partial Reconsideration* was sent this 17th day of November, 2003, via hand where indicated and via United States First Class Mail, postage prepaid, to the following:

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